SC92500

IN THE SUPREME COURT OF MISSOURI

PEGGY NORTHCOTT AND LARRY POTASHNICK,

Respondents/Cross-Appellants,

vs.

ROBIN CARNAHAN, Missouri Secretary of State, et al.,

Appellants/Cross-Respondents.

Appeal from the Circuit Court of Cole County, Missouri
Nineteenth Judicial Circuit
The Honorable Daniel R. Green, Judge

BRIEF OF APPELLANTS/CROSS-RESPONDENTS GEORGE DENNIS SHULL AND JERRY STOCKMAN

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JURISDICTIONAL STATEMENT

In this appeal, Appellants George Dennis Shull and Jerry Stockman appeal from the April 17, 2012 Second Amended Final Judgment of the Circuit Court of Cole County denying Shull and Stockman permissive intervention in four initiative petition cases raising substantially the same issues. On May 14, 2012, this Court ordered all appeals pending in the Court of Appeals, Western District, which stemmed from the circuit court's April 17, 2012 judgment to be transferred to this Court.

INTRODUCTION

The People of this State reserved the right "to propose and enact or reject laws and amendments to the Constitution." Mo. Const. Art. III, § 49. As this Court has explained: "Nothing in our constitution so closely models participatory democracy in its pure form. Through the initiative process, those who have no access to or influence with elected representatives may take their cause directly to the people." *Missourians to Protect the Initiative Process v. Blunt,* 799 S.W.2d 824, 827 (Mo. banc 1990). The trial court's decision in this case to deny permissive intervention to the People represents a complete subversion of the "participatory democracy," *id*, intended by the initiative process.

Appellants here are citizens, residents, registered voters and taxpayers of the State of Missouri who support an initiative petition that would limit the annual rate for payday, title, installment and other consumer credit loans from triple-digit interest rates, reaching as high as 444% annually. Appellants exercised their rights under Article III, § 49 by signing the initiative petition and by donating funds in favor of the initiative petition.

They have an interest in seeing it appear on the November 2012 ballot and in exercising their right under Article III to have their initiative proposal presented to registered voters.

Appellants are also part of a larger faith-based grassroots and almost entirely volunteer effort dedicated to reforming the devastating impact of high cost lending on the citizens and taxpayers of Missouri. Appellate courts in Missouri have found the practices of these high cost lenders, such as those commonly known as payday loans, to be high cost based on customers' assets, i.e. their bank account or car, rather than a meaningful ability to repay. As the Eastern District Court of Appeals has noted:

> [T]hese loan contracts are not ordinary bank loans, based on collateral. Rather, the loans disseminated by [the payday lender] are against its customers' paychecks, suggesting that there is a great deal of economic compulsion motivating [the lender's] customers, in that they are living paycheck to paycheck, and . . . since [the lender's] business is based on the fact that its customers need loans before they even receive their next paycheck, and thus are forced by dire personal economic circumstances to patronize [the lender's] business and incur interest rates of up to 400 percent.

Woods v. QC Financial Services, Inc., 280 S.W.3d 90, 97 (Mo. Ct. App. 2008). This Court highlighted the harms of high-cost lending in *Brewer v. Missouri Title Loans,* SC90647, 2012 WL 716878, at *1 (Mo. Mar. 6, 2012) when it explained that a title loan customer, Beverly Brewer, "borrowed $2,215 from the title company. The loan was secured by the title to Brewer's automobile. The annual percentage rate on the loan was

300 percent." Not only did the loan carry an extremely high interest rate, but the entire loan contract was "non-negotiable and was difficult for the average consumer to understand and . . . the title company was in a superior bargaining position." *Id.* at *7. Appellants and the grassroots effort to which they belong are simply trying to bring a much-needed element of fairness to the payday loan industry.

The immense profitability of high-cost loans allows those in the industry to purchase the continued support and protection of Missouri legislators, who have failed to enact legislation to place a reasonable limit on interest rates.[1] Without a statutory interest rate cap to mandate responsible lending, Missouri will continue to hold itself out as a beacon for high-cost lenders, who drain $317 million annually from the state in payday loan fees alone.[2] The Article III ballot initiative process is the only way for Missourians in support of responsible lending practices to obtain relief from the economic distress wrought by high-cost, predatory lending.

Sadly, even Missouri's forum for "participatory democracy" has been tainted and burdened by the high cost loan industry's ability to purchase its ongoing security and freedom from regulation. Section 116.190 allows political opponents of ballot initiatives to file legal challenges to challenge the sufficiency of the ballot title or fiscal note.

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[1] "Payday lender opponents, stymied in General Assembly, turn to petition drives" Paul Koepp 17 February 2012 Kansas City Business Journal

[2] Uriah King and Leslie Parrish, "Financial Quicksand," Center for Responsible Lending (November 20, 2006)

Frequently, a goal of § 116.190 suits has been to make it harder for proponents to collect signatures and to qualify the initiative petition for the ballot. That is precisely what has occurred here.

Respondents are opponents of the initiative who represent the high-cost loan industry. They filed four separate, yet nearly identical, lawsuits challenging the ballot title and fiscal note for the initiative petition (the Industry Suits) under § 116.190.[3] These suits proceeded to trial on March 27, 2012, with four sets of lawyers representing each of the four industry plaintiffs. However, through an incomprehensible abuse of judicial discretion, the parties in favor of the initiative petition with a strong personal interest in seeing the initiative petition appear on the November 2012 ballot were forbidden from intervening to defend the viability of a petition that has garnered the signatures of over 180,000 Missourians who want to see this on the November 2012 ballot.

[3] In a recent report to investors, QC Holdings, company that offers payday, car title, and installment loans in Missouri and is the employer of Plaintiff Prentzler, took note of the Missouri Initiative petition and informed investors that "[w]e have already spent substantial amounts opposing the efforts to place this initiative on the ballot. If the initiative obtains the required signatures and otherwise meets the legal requirements to place the initiative on the Missouri ballot for November 2012, we will spend substantial additional amounts to defeat the proposal…" QC Holdings 2011 10-K (filed March 14, 2012), http://www.qcholdings.com/investor.aspx?id=8

When an initiative petition's opponents challenge the ballot title, fiscal note, or sufficiency of the initiative petition, it has been very common, if not the norm, for citizens who signed the initiative petition, or other proponents of the initiative petition, to move to intervene as defendants in the litigation to protect their right to propose the specific law they support by the initiative process and to otherwise defend against the plaintiffs' attacks. There has been a *de facto* rule in Cole County Circuit Court (where all such litigation must be filed) allowing such persons to intervene as defendants on § 116.190 litigation[4] – until now, that is.

[4] Cases involving such intervenors include: *Missouri Municipal League v. Carnahan*, 2011 WL 3925612 (Mo. App. W.D. Sept. 6, 2011) (intervention by person who submitted initiative petition at issue); *Busch v. Carnahan*, 320 S.W.3d 757 (Mo. App. W.D. 2010) (same); *State ex rel. Humane Society v. Beetem*, 317 S.W.3d 669 (Mo. App. W.D. 2010) (intervention by member of coalition group advocating for initiative petition's passage); *Missouri Municipal League v. Carnahan*, 303 S.W.3d 573 (Mo. App. W.D. 2010) (intervention by person who submitted initiative petition); *Cole v. Carnahan*, 272 S.W.3d 392 (Mo. App. W.D. 2008) (intervention by citizens who signed initiative petition); *Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 452 (Mo. App. W.D. 2006) (intervention by "a number of Missouri citizens," including former Senator John Danforth); *Overfelt v. McCaskill*, 81 S.W.3d 732, 734 (Mo. App. W.D. 2002) (intervention by Missouri citizen proponents of initiative petition and by "Citizens for a Healthy Missouri"); *Missourians to Protect the Initiative Process v. Blunt*,

In a radical departure from clear precedent set by appellate courts in Missouri that "[i]ntervention should be allowed with considerable liberality," *Ainsworth v. Old Sec. Life Ins. Co.,* 685 S.W.2d 583, 586 (Mo. App. W.D. 1985), the circuit court denied Appellants' intervention in all four Industry Suits on both intervention of right and permissive intervention grounds, even after the circuit court had initially granted intervention in two of the suits on unspecified grounds. The only reason given by the circuit court was because Appellants, like the Secretary of State and State Auditor, sought to preserve the ballot title and fiscal note as they were drafted.

The circuit court abused its discretion in denying permissive intervention to Appellants Shull and Stockman. The facts accepted as true by the circuit court in ruling on the motions show that Appellants have a substantial interest, as signers and supporters of the Initiative Petition, in the outcome of the Industry Suits because their legal right to propose the law they favor through the Article III, § 49 initiative process and to circulate and sign a petition to qualify their initiative for the ballot will be directly affected by a judgment in Plaintiffs' favor. This interest is unique to Appellants and is not shared by

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799 S.W.2d 824 (Mo. banc 1990) (intervention by "Yes for Ethics Committee" that proposed initiative petition); *Union Electric v. Kirkpatrick*, 678 S.W.2d 402 (Mo. banc 1984) (intervention by citizen on committee sponsored initiative petition); and *Buchanan v. Kirkpatrick*, 615 S.W.2d 6 (Mo. banc 1981) (intervention by citizens Mel Hancock and C.R. Johnston, Taxpayers Survival Association, Inc. and Missouri Farm Bureau Federation).

the State Defendants. Appellants have unique defenses that they could have and would have raised at trial had they been permitted to intervene. Finally, Appellants have no alternative means of defending the Initiative Petition other than through intervention.

In failing to recognize the unique interests of Appellants in defending the Initiative Petition, the circuit court handed the high-cost loan industry the luxury of coasting through a trial with virtually no opposition. The two State Defendants, significantly outmatched by the Industry's wealth and resources, took no discovery, retained no experts, allowed absurd testimony to go unchallenged, and prepared absolutely no defense of the Initiative Petition. The circuit court heard only the self-serving testimony of the Industry, while the proponents of the Initiative Petition with the interest and ability to mount a vigorous defense, were denied the opportunity to defend the very same Initiative Petition they helped to create and circulate as an expression of their right under Article III, § 49.

STATEMENT OF FACTS

A. The Proposed Initiative Petition.

On July 7, 2011, Missouri citizen Reverend James J. Bryan submitted to Secretary of State Robin Carnahan a sample sheet for a proposed initiative petition (the Initiative Petition) that would limit the annual rate for payday,[5] title,[6] installment,[7] and certain other

[5] Payday loans are marketed as short-term cash advances. A borrower writes a personal check to the payday lender, who holds the post-dated check for a period of 14 to 31 days. At the end of the period, the check is deposited, the borrower returns with cash

small dollar consumer credit loans[8] that frequently carry triple-digit annual interest rates.[9] (*See* Prentzler L.F. 26-30; Reuter L.F. 121-26; Northcott L.F. 23-27; Francis L.F. 25-28.)

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to reclaim the check, or, quite frequently, the loan is renewed and the borrower pays additional fees. According to a January 2011 Missouri Division of Finance report, Missouri had an average of 1,040 payday lenders in operation between October 2009 and September 2010. During that time frame, these lenders made more than 2.43 million payday loans. The average interest rate of such loans was 444.61%. The report indicates that Missouri licenses nearly twice as many payday lenders as Kentucky and Illinois, and nearly three times as many payday lenders as Oklahoma and Iowa. *See* Missouri Division of Finance, Report to General Assembly pursuant to section 408.506, RSMo. (January 4, 2011), available at: http://finance.mo.gov/consumercredit/documents/2011PaydayLenderSurvey.pdf (last visited May 28, 2012).

[6] Title loans are like payday loans, except that they are secured by the borrower's car rather than a borrower's post-dated check, as in the case of payday loans. If a borrower defaults, the vehicle may be repossessed.

[7] Consumer installment loans made under § 408.510, RSMo. may be in any amount, secured or unsecured, but must be repayable in at least four equal installments over a period of 120 days.

[8] Section 367.100, RSMo. governs consumer credit loans of $500 or more.

A copy of the Initiative Petition appears in the Legal Files for these consolidated appeals. (Prentzler L.F. 26-30; Reuter L.F. 121-126; Northcott L.F. 23-27; Francis L.F. 25-28.) As stated therein, the purpose of the Initiative Petition is:

> to prevent lenders, such as those who make what are commonly known as payday loans, car title loans, and installment loans, which have typically carried triple-digit interest rates as high as three hundred percent annually or higher, from charging excessive fees and interest rates that can lead families into a cycle of debt by:
>
> (1) Reducing the annual percentage rate for payday, title, installment and other high cost consumer credit and small loans from triple-digit interest rates to thirty-six percent per year;
>
> (2) Extending to veterans and others the same thirty-six percent rate limit in place for payday and title loans to active military families as enacted by the 109th United States Congress in 10 U.S.C. § 987; and

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[9] *See, e.g.,* Missouri Division of Finance, Report to General Assembly pursuant to section 408.506, RSMo. (January 4, 2011) (444% APR average for payday loans); State Auditor's Report, "Division Of Finance And Regulation Of Instant Loan Industry," Report No. 2001-36 (May 9, 2001) (noting that charges on car title loans frequently reach as high as 300% APR in Missouri).

(3) Preserving fair lending by prohibiting lenders from structuring other transactions to avoid the rate limit through subterfuge.

(*Id.*)

The Secretary of State certified the official ballot title for the Initiative Petition on August 9, 2011. (Prentzler L.F. 49; Reuter L.F. 15; Northcott L.F. 44; Francis L.F. 50.) The official ballot title reads:

> Shall Missouri law be amended to limit the annual rate of interest, fees, and finance charges for payday, title, installment, and consumer credit loans and prohibit such lenders from using other transactions to avoid the rate limit?
>
> State governmental entities could have annual lost revenue estimated at $2.5 to $3.5 million that could be partially offset by expenditure reductions for monitoring industry compliance. Local governmental entities could have unknown total lost revenue related to business license or other business operating fees if the proposal results in business closures.

(Prentzler L.F. 13, 49; Reuter L.F. 15; Northcott L.F. 10, 44; Francis L.F. 15, 50.)

The Initiative Petition was circulated through a broad-based, largely volunteer grassroots effort as hundreds of congregations and thousands of volunteers from across Missouri worked to collect signatures since the Initiative Petition was certified in August 2011. It has been endorsed by 44 groups, including AARP Missouri, the Consumers Council of Missouri, Goodwill – Eastern Kansas and Western Missouri, Catholic

Charities of Central and Northern Missouri, Metropolitan Congregations United, Missouri Alliance of Retired Americans, Missouri Faith Voices, Missouri Rural Crisis Center, the N.A.A.C.P., and Service Employees International Union.[10] At least 180,000 signatures –nearly double the required threshold - were collected by these efforts and submitted by the constitutional deadline of May 6, 2012.[11]

Appellants George Dennis Shull, a retired military officer, and Jerry Stockman, a retired priest, signed the Initiative Petition, donated money in favor of it, and have an interest in advocating for its qualification for the November 2012 ballot and for its ultimate approval by the voters. (Prentzler L.F. 112-118; Reuter L.F. 65-71; Northcott L.F. 144-149; Francis L.F. 96-102.)

B. Ballot title litigation before the circuit court and Appellants' intervention motions.

After the Secretary of State certified the official ballot title for the Initiative Petition in August 2011, opponents filed four separate, yet nearly identical, lawsuits (the Industry Suits) claiming that the official ballot title and fiscal note for the Initiative Petition are insufficient and unfair within the meaning of § 116.190, RSMo. (*See* Prentzler L.F. 10-25; Reuter L.F. 12-20; Northcott L.F. 8-22; Francis L.F. 11-24.)

The case styles for the Industry Suits are:

- *Prentzler v. Carnahan, et al.*, Case No. 11AC-CC00549;

[10] *See* http://moresponsiblelending.org/endorsers (last visited May 28, 2012).

[11] http://www.columbiamissourian.com/stories/2012/05/07/payday-loan-petition/

- *Reuter v. Carnahan, et al.*, Case No. 11AC-CC00552;
- *Northcott v. Carnahan, et al.*, Case No. 11AC-CC00557; and
- *Francis v. Carnahan, et al.*, Case No. 11AC-CC00546.

Plaintiff Prentzler has been identified as an executive with a Kansas-based company QC Holdings Inc., which offers payday loans, car title loans, and consumer installment loans.[12] Plaintiff Reuter is identified in his petition as an employee and part owner of American Credit Services, LLC, a consumer installment lending business licensed with the Missouri Division of Finance. (Reuter L.F. 12.) Plaintiff Francis is identified as a customer of installment loan companies in Missouri, and her co-plaintiff Troy Hoover is identified as an employee of Texas-based Western Shamrock, Inc., which offers installment loans. (Francis L.F. 12.) Plaintiff Northcott and her co-plaintiff Larry Potashnick are identified in their petition as the owners and operators of a litigation financing company licensed with the Missouri Department of Insurance. (Northcott L.F. 9.)

In general, the Industry Suits claim that the Secretary of State's summary statement should have provided more details about the proposal and that the State Auditor's fiscal note and fiscal note summary understated the cost of the Initiative Petition. The *Prentzler*, *Northcott*, and *Reuter* suits specifically sought to have any signatures in favor of the Initiative Petition declared invalid or otherwise stricken so that

[12] See http://www.stltoday.com/news/local/govt-and-politics/political-fix/article_1898f5ca-ccd5-11e0-bc25-0019bb30f31a.html (last visited May 28, 2012).

they would not be able to count toward the Initiative Petition qualifying for the November 2012 ballot. (Prentzler L.F. 25; Reuter L.F. 20; Northcott L.F. 22.)

The *Prentzler and Northcott* cases were assigned to Judge Green. (Prentzler L.F. 1; Northcott L.F. 1.) *Francis* was assigned to Judge Joyce, and *Reuter* was assigned to Judge Beetem. (Francis L.F. 1; Reuter L.F. 1.) The *Francis* plaintiffs filed an automatic change of judge pursuant to Rule 51.05 on September 14, 2011, and their case was reassigned to Judge Green. (Francis L.F. 1-2.)

Appellants Shull and Stockman moved in September 2011 to intervene in the *Reuter* and *Prentzler* cases according to either permissive intervention or intervention of right. (Prentzler L.F. 73-77; Reuter L.F. 21-26.) Although Prentzler had initially objected to intervention, he withdrew his objections, and on October 19, 2011, Judge Green entered an order allowing Appellants' intervention in the *Prentzler* case on unspecified grounds. (Prentzler L.F. 97.) Appellants served discovery on Prentzler on November 10, 2011. (Prentzler L.F. 3.)

Appellants were not aware of the pendency of the *Francis* and *Northcott* cases until late November 2011[13], and soon moved to intervene in both. A short argument was

[13] On August 20, 2011, the day after the deadline for filing suits challenging the ballot title and fiscal note for the Initiative Petition, counsel for Appellants personally went to the circuit clerk's office and requested to see copies of all petitions that had been filed against Secretary of State Carnahan or State Auditor Schweich in the past week. For reasons unknown to Appellants' counsel, the *Northcott* and *Francis* cases were not

held on November 28, 2011 before Judge Green on Appellants' motion to intervene in the *Francis* case. Judge Green took Appellants' intervention motion under advisement and set a trial date of February 28, 2012 for the challenge to the ballot title and fiscal note. (Francis L.F. 2-3.) He indicated that it would be his preference to try all four lawsuits challenging the ballot title and fiscal note for the Initiative Petition on February 28th on a common record.

Meanwhile, because of delays by the plaintiff in *Reuter* in serving the summonses, delays in getting a mutually agreeable hearing date before Judge Beetem, Judge Beetem's decision to transfer the *Reuter* case to Judge Green, and then further delays because of court reporter availability for a hearing before Judge Green, Appellants Shull and Stockman were not able to have the circuit court take up their intervention motion in the *Reuter* case until December 12, 2011. (*See* Reuter L.F. 3.)

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identified by the clerk's office in response to this request. In addition, a contemporary newspaper article reported that only one suit had been filed by opponents. *See* http://www.stltoday.com/news/local/govt-and-politics/political-fix/article_1898f5ca-ccd5-11e0-bc25-0019bb30f31a.html (last visited May 28, 2012). After having found two suits filed by opponents challenging the ballot title and fiscal note, Appellants' counsel did not suspect that *two more* suits would have been filed by the industry on the same initiative petition. Counsel learned of the *Francis* case and immediately moved to intervene soon after Francis obtained a change of judge and requested a trial setting.

During the December 12, 2011 hearing, Appellants offered four exhibits in support of intervention. Exhibits 1 and 2 were copies of affidavits of circulators who witnessed Shull and Stockman sign the initiative petition. (Reuter 12/12/11 Tr. 3.) Exhibits 3 and 4 were copies of verified interrogatory responses from Shull and Stockman. (*Id.* 3-4.)

After hearing argument on December 12, 2011, Judge Green indicated that he was inclined to sustain Appellants' motion to intervene on grounds of either permissive intervention or intervention as of right. (Reuter 12/12/11 Tr. 10-12.) Because it had previously been the practice in the Circuit Court of Cole County to grant such motions on permissive grounds, the order was drawn up to be sustained on permissive intervention grounds. (Reuter 12/12/11 Tr. 12; L.F. 3.) Soon after Appellants became parties to the case, they served discovery on Reuter, asking him, among other things, to disclose any expert witnesses he might call at trial. (*See* Reuter L.F. 4.)

Having successfully convinced Judge Green on December 12, 2011 that they should be parties to the *Reuter* case, Appellants noticed their intervention motions in the *Francis* and *Northcott* cases for Judge Green's next law day, and a joint hearing in both matters was held on December 28, 2011. The court heard arguments based on both intervention of right and permissive intervention. (Northcott/Francis 12/28/11 Tr. 6.) In support of the motion to intervene in the *Northcott* case and for purposes of the joint hearing, Appellants asked the circuit court to take judicial notice of a prior successful motion to intervene by a citizen signer of an initiative petition, which had been prepared

by Northcott's counsel. (Northcott/Francis 12/28/11 Tr. 7-8.[14]) Appellants also offered, and the circuit court admitted into evidence, copies of exhibits very similar to those offered in the *Reuter* case. Each of the exhibits had been attached to Appellants' intervention motion and appear in the Legal File. Exhibits B and C were copies of Shull's and Stockman's verified interrogatory responses, and Exhibits D and E were copies of affidavits of circulators who witnessed Shull and Stockman sign the initiative petition. (Northcott/Francis 12/28/11 Tr. 8-10; Northcott L.F. 100-123.)

At the same joint hearing, Appellants offered a second set of similar exhibits in support of the *Francis* intervention motion, but were met by evidentiary objections from counsel for Francis. (Northcott/Francis 12/28/11 Tr. 11-15.) Rather than ruling on the evidentiary objections, Judge Green gave Appellants additional time to make further submissions in support of intervention. (Northcott/Francis 12/28/11 Tr. 26.)

On January 3, 2012, Appellants submitted original detailed affidavits in further support of their intervention motions in the *Francis* and *Northcott* cases. (*See* Northcott L.F. 144-150; Francis L.F. 96-102.)

Due to indications from Prentzler and Reuter that they would likely ask Judge Green to reconsider Appellants' intervention in their cases, Appellants supplemented the record in *Reuter* and *Prentzler* by filing original affidavits and suggestions on January 13,

[14] Because there was a joint hearing in the *Francis* and *Northcott* cases, Appellants included a copy of the same transcript in both the record on appeal in *Francis* and in *Northcott*.

2012 that were similar to those filed in the *Francis* and *Northcott* cases. (Reuter L.F. 65-71; Prentzler L.F. 112-118.)

The affidavits submitted in all four cases include testimony that:

- Appellants are citizens, residents, registered voters and taxpayers of the State of Missouri who signed the Initiative Petition, donated funds in favor of it;
- Appellants have a personal interest in having their signatures count as valid, in seeing that the Initiative Petition is circulated and considered valid, and in advocating for voter approval of the Initiative Petition, all of which would be impaired if any of the Plaintiffs succeeded in having the summary statement, fiscal note, and/or fiscal note summary found insufficient or unfair;
- The constitutional deadline for submitting signatures in support of the Initiative Petition is set in May 2012. If any of the Plaintiffs succeeded in their claims in the litigation, Appellants' and other supporters of the Initiative Petition could be left without adequate time to collect new signatures under a revised ballot title or fiscal note and could be effectively denied the opportunity to have the Initiative Petition appear on the November 2012 ballot;
- Appellants' interests as supporters, signers, advocates, and donors for the Initiative Petition are different from the interests of the State Defendants Carnahan and Schweich, who were joined in their official

capacities rather than as proponents of the Initiative, and the reasons why and bases for asserting that the summary statement, fiscal note, and/or fiscal note summary are fair and sufficient are different from the reasons and bases asserted by the State Defendants;

- Appellants' interests in moving this litigation forward expeditiously are different from the interests of the current Defendants because Defendants' stated position is that they are neutral with respect to time;
- Appellants' interests in seeing that the Initiative Petition is circulated, in having their signatures count, in actively advocating for voter approval of the Initiative Petition, in donating funds to support the Initiative Petition, in moving this litigation forward expeditiously, and in seeking appellate review if any decision is reached adverse to their interests are unique to them.

(Prentzler L.F. 112-118; Reuter L.F. 65-71; Northcott L.F. 144-150; Francis L.F. 96-102.)

Although Appellants remained hopeful that Judge Green would, without further ado, grant their intervention motions that had been under advisement in the *Francis* and *Northcott* cases, Appellants sought to bring the issue to a head by moving the circuit court to change the notation of its earlier ruling allowing intervention in the *Reuter* case from permissive intervention to intervention as of right and noticed that motion for hearing at Judge Green's next law day on January 23rd. (Reuter L.F. 4.)

Reuter responded by filing a motion to dismiss Appellants from the *Reuter* case. Reuter claimed that dismissal was appropriate because Appellants "failed to show any personal rights or interests which require protection through Intervenors' involvement with this case." (Reuter L.F. 72-79.) Reuter's motion to dismiss did not cite a single case to support the arguments made therein. (*Id.*)

Because of a jury trial that ran long on January 23rd, Appellants were not able to get a hearing before Judge Green until January 30th.

C. The January 30, 2012 hearing.

On January 30th, Judge Green heard argument on Appellants' motion to change the notation of the grounds for intervention from permissive intervention to intervention as of right and on Reuter's motion to dismiss. Counsel for plaintiffs in the *Prentzler*, *Northcott*, and *Francis* cases were present in the courtroom. Counsel for plaintiff and a proposed intervenor in another ballot title case involving a separate minimum wage initiative petition, *Allred v. Carnahan*, Case No. 11AC-CC00743, were also present, as Judge Green was scheduled to hear argument immediately afterwards on the ability of the proponent of the minimum wage petition to intervene in that case.

During the January 30, 2012 argument, Appellants' counsel directed Judge Green's attention to case law stating that intervention rules should be liberally construed so as to permit broad intervention. (Reuter 01/30/12 Tr. 7-8.) Judge Green indicated that given the political nature of the case, he would assume that Appellants had a sufficient interest in the case to meet that portion of the intervention test. (Reuter 01/30/12 Tr. 12.) He then remarked that in the one initiative petition case over which he had presided,

Missouri Municipal League v. Carnahan, 10AC-CC00866, *aff'd* 2011 WL 3925612 (Mo. App. W.D. Sept. 6, 2011), he "saw the Missouri Municipal League run Mr. Calzone ragged and in hindsight, I probably shouldn't have let them in the case." (Reuter 01/30/12 Tr. 11.)[15]

Following this observation, Judge Green asked counsel for Appellants whether Appellants "want the ballot language that's approved right now to remain the same?" (Reuter 01/30/12 Tr. 11.) After Appellants' counsel agreed, Judge Green asked, "So how is that interest not adequately being represented by the statutory people in charge of it, the Auditor and the Secretary of State?" (*Id.*)

Appellants' counsel explained that Appellants' interests were different than the State defendants, who were there in their official capacities and not as proponents of the underlying measure, and that they had different interests in seeking appellate review, among other things. Appellants' counsel also pointed out that while fiscal notes were typically the subject of an evidentiary hearing and a trial was looming, the State Auditor inexplicably had not served any discovery on the Plaintiffs and did not intend to engage

[15] It is unclear what Judge Green meant by this comment or why this particular experience applied to the present circumstances. Mr. Calzone was a proponent of the underlying initiative petition and moved pro se to intervene as a defendant in an action brought by the Missouri Municipal League (MML) challenging the ballot title and fiscal note for Mr. Calzone's initiative petition. Since MML was the plaintiff, Judge Green could not have kept "them" out of the case.

in any discovery and that Appellants did not believe their interests were being adequately represented by a party that was "walking in blind to a trial." (Reuter 01/30/12 Tr. 12-13.)

Appellants' counsel distinguished her clients' position from the permissive intervenors in *Committee for Educational Quality v. State*, 294 S.W.3d 477, 486-89 (Mo. banc 2009), identified and asked the court to take judicial notice of certified copies of the docket sheets in each of the four Industry Suits, along with certificates of service, showing that the Auditor had failed to serve any discovery, and tendered a proposed order. (Reuter 01/30/12 Tr. 15-17.) Judge Green indicated that he would dismiss Appellants from the case and allow them to participate as amicus only. But in his last statement before going off the record, Judge Green indicated that he had some doubt about that ruling. He said, "So somebody get me – hope that you can get me an answer by someone who publishes their opinions." (Reuter 01/30/12 Tr. 17.)

D. The circuit court's February 3, 2012 orders.

On February 3, 2012, Judge Green entered four orders that differed only insofar as necessary to take into account the different procedural postures of the four cases. The *Reuter* order denied Appellants' motion to change the notion of intervention to intervention as of right and granted Rueter's motion to dismiss Shull and Stockman as parties. (Reuter L.F. 83-85.) The *Prentzler* order concluded that Appellants did not meet the test for intervention as of right and *sua sponte* dismissed Appellants from the case. (Prentzler L.F. 119-120.) The *Francis* and *Northcott* orders denied Appellants' intervention motions. (Northcott L.F. 166-167; Francis L.F. 121-122.)

Each of the orders indicates that the circuit court "accept[ed] as true ... all factual allegations set forth in the affidavits submitted by Shull and Stockman." The circuit court denied intervention as of right because:

> the Court concludes that since Intervenors seek to defend the ballot title and fiscal note for the subject Initiative in the exact form they were issued and approved by Secretary of State and State Auditor, Intervenors have failed to show how their interests will not be protected by the Secretary of State and Auditor, both of whom remain as parties to this case.
>
> As requested by Counsel for Intervenors, the Court takes notice of the court records they offered at the January 30, 2012 hearing and accepts as true that the State Auditor has served no discovery in this case or in the companion cases of *Prentzler v. Carnahan*, 11AC-CC00549, *Francis v. Carnahan*, 11AC-CC00546, and *Northcott v. Carnahan,* 11AC-CC00557. However, the Court finds that Intervenors' claim of right to conduct discovery in a case where the other parties do not is secondary to the right to participate in the litigation in the first place, and cannot in and of itself give rise to the right to participate.

(Reuter L.F. 80-82; Prentzler 119-120; Northcott L.F. 166-167; Francis L.F. 121-122.) The court did not explain in any of the orders its basis for denying permissive intervention. (*Id.*)

E. Appeal of denial of intervention of right to Missouri Court of Appeals

On February 23, 2012, Judge Green entered "Final Judgments" on intervention in each of the four cases. (Prentzler L.F. 121-122; Reuter L.F. 83-85; Northcott L.F. 168-

169; Francis L.F. 123-124.) The February 23, 2012 final judgments are the same as the February 3, 2012 orders, except that they have a different title and include an express finding pursuant to Rule 74.01(b) that there is no just reason for delay in entering judgment against intervenors and that the judgment is final for purposes of appeal. (*Id.*)

Appellants filed a timely notice of appeal and appealed the circuit court's denial of intervention of right to the Missouri Court of Appeals. The Missouri Court of Appeals for the Western District issued an opinion on March 26, 2012 affirming the circuit court's denial of intervention of right in *Prentzler*, *Reuter*, *Northcott*, and *Francis*. (Prentzler L.F.134-145; Reuter L.F. 88-99; Northcott L.R. 172-183; Francis L.F. 127-138).

F. The March 27, 2012 trial

The circuit court conducted a one day trial on a common record for all four industry suits on March 27, 2012. With respect to pre-trial discovery, Plaintiffs served written discovery and took a Rule 57.03(b)(6) deposition of the Auditor's corporate representative. The State Defendants served no written discovery and took no depositions. While they were parties to the *Prentzler* and *Reuter* cases, Shull and Stockman served discovery on those plaintiffs. However, because Shull and Stockman were never permitted to intervene in the *Northcott* and *Francis* cases, they were never able to serve discovery on the plaintiffs in those cases.

At trial, Plaintiffs called three witnesses and offered documentary evidence, interrogatory responses from the Auditor, and deposition designations from the Rule 57.03(b)(4) deposition of the Auditor. Plaintiffs Northcott and Potashnick called John Halwes as a witness. Plaintiff Prentzler called Dr. Joseph Haslag as an expert, and

Plaintiffs Francis and Hoover called Dr. Thomas Durkin as an expert. Dr. Durkin was a surprise expert who had not been previously disclosed or deposed. The State Defendants offered no evidence at trial. (Northcott Tr. 3/27/12 219.)

On Thursday, April 5, 2012, Judge Green entered a judgment for Plaintiffs concluding that the Fiscal Note and Fiscal Note Summary were "inadequate" and "unfair" and must be remanded to the Auditor to be redone. (Northcott L.F. 329-332). The circuit court also determined that the Secretary of State's summary statement was "insufficient, unfair and likely to deceive voters" because it did not state the exact percentage of the 36% annual interest rate limit of the Initiative Petition. (Northcott L.F. 327-328). The circuit court entered a final judgment on April 17, 2012 that contained the same findings in favor of Plaintiffs, but explicitly stated that it made no determination as to the validity of the signatures already collected in favor of the Initiative Petition. (Francis L.F. 275; Northcott L.F. 294; Prentzler L.F. 209; Reuter L.F. 163) (Appendix A1). Appellants take their appeal from this final judgment.

Appellants Shull and Stockman filed a notice of appeal to the Court of Appeal for the Western District on April 25, 2012.

POINT RELIED ON

The circuit court abused its discretion in denying Appellants George Dennis Shull and Jerry Stockman permissive intervention in the Industry Suits because the facts accepted as true by, and the uncontroverted record before, the circuit court show that Appellants meet the standard for permissive intervention in that (1) as proponents of the Initiative Petition they possess a unique interest in defending the

Initiative Petition that is not shared by the State Defendants; and (2) they have no alternative means of defending the Initiative Petition other than through intervention in the Industry Suits.

STANDARD OF REVIEW

The trial court's denial of a motion for permissive intervention is subject to reversal for an abuse of discretion. *Comm. for Educ. Equal. v. State,* 294 S.W.3d 477, 487 (Mo. banc 2009). An abuse of discretion is found "when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration" but is not found "if reasonable people can differ about the propriety of the action taken by the trial court[.]" *State ex rel Nixon v. Am. Tobacco Co.,* 34 S.W.3d 122, 131 (Mo. banc 2000) (quoting *Richardson v. State Highway & Transp. Comm'n,* 863 S.W.2d 876, 881 (Mo. banc 1993)).

ARGUMENT

A. The Circuit Court Abused its Discretion in Denying Appellants' Motion for Permissive Intervention

It is firmly established that Missouri Supreme Court Rule 52.12 "should be liberally construed to permit broad intervention." *Underwood v. St. Joseph Bd. of Zoning Adjustment*, 2012 WL 117747, *4. (Mo. App. W.D., Jan. 17, 2012) (internal quotations omitted); *Ainsworth v. Old Sec. Life Ins. Co.*, 685 S.W.2d 583, 586 (Mo. App. W.D. 1985) ("Intervention should be allowed with considerable liberality."); *State ex rel. Aubuchon v. Jones*, 389 S.W.2d 854, 862 (Mo. App. 1965) ("Courts have been very

liberal in permitting interested persons to intervene and become parties so that complete justice may be done. . . .").

Pursuant to Missouri Supreme Court Rule 52.12(b), courts may grant permissive intervention in three circumstances: "(1) when allowed by statute; (2) when an applicant's *claim or defense* and the main action have a question of law or fact in common; or (3) where the State is seeking intervention in a case raising constitutional or statutory challenges." *Comm. for Educ. Equality,* 294 S.W.2d at 487 (emphasis in original). Appellants here seek to intervene permissively insofar as their defense of the Initiative Petition shares questions of law and fact with the main action. Specifically, if allowed to intervene, Appellants would present a defense to show that both the summary statement and fiscal note are fair and sufficient as required by Missouri law.

While permissive intervention is "subject to the trial court's sound discretion," *Centerre Trust Co. v. Jackson Saw Mill Co.,* 736 S.W.2d 583, 586 (Mo. App. 1985) (internal quotation and citation omitted), a court should grant permissive intervention when "substantial justice mandates intervention." *Meyer v. Meyer,* 842 S.W.2d 184, 188 (Mo. App. 1992). Permissive intervention should be granted when a proposed intervenor has "an economic interest in the outcome of the suit." *Id.* (finding abuse of discretion when trial court denied permissive intervention to party with an economic interest in the outcome and where intervention would not result in any prejudice to existing parties). While a proposed intervenor must do more than merely reassert claims or defenses identical to the existing parties, permissive intervention is appropriate when the proposed intervenor asserts a "claim, defense or interest unique to themselves." *See Comm. for*

Educ. Equal., 294 S.W.3d at 487. *See also Johnson v. State,* 2012 Mo. LEXIS 99, *17 (Mo. May 25, 2012) ("Proposed intervenors are not entitled to permissive intervention if they simply will reassert the same defenses, but intervention can be appropriate when the intervenors can show 'interest *unique* to themselves.'") (internal citation and quotation omitted) (emphasis in original). Appellate courts in Missouri also consider whether alternative forms of relief are available to the proposed intervenor and whether intervention will cause undue delay and/or prejudice to the original parties. *See. Am. Tobacco Co.,* 34 S.W.3d at 131; *McMahan v. Geldersma,* 317 S.W. 3d 700, 706 (Mo. App. 2010).

i. Appellants' Shull and Stockman possess a unique interest in the defense of the Initiative Petition.

Appellants Shull and Stockman possess a unique interest in the outcome of this litigation that is not shared by Defendants Carnahan and Schweich. Appellants have exercised their constitutional right under Article III, § 49 by signing the Initiative Petition, donating funds in support of the Initiative Petition, and volunteering time and efforts in support of the Initiative Petition. Accordingly, Appellants have a *personal* interest in having their signatures count in support of the Initiative Petition, in having the signatures of others count in support of the Initiative Petition, in seeing that the Initiative Petition is circulated and counted as valid, and in advocating for ultimate voter approval of the Initiative Petition. As supporters, signers, advocates, donors and volunteers for the Initiative Petition, Appellants Shull and Stockman possess a unique, personal interest in

the outcome of this litigation that is readily distinguished from the official interests of Defendants Carnahan and Schweich.

Defendants Carnahan and Schweich are neither proponents nor opponents of the Initiative Petition. They were joined as Defendants in their official capacities only, are neutral with respect to whether the Initiative Petition appears on the November 2012 ballot, and are neutral with respect to whether the Initiative Petition obtains final voter approval. Indeed, Defendants Carnahan and Schweich made their indifference to the outcome of the Initiative Petition abundantly clear to the trial court and the taxpayers of Missouri. The State Defendants did not conduct any discovery, did not engage any experts or present expert testimony, and did not develop any legal strategies or arguments beyond those necessary to defend their institutional interests. Given the blatant indifference of the State Defendants to the ultimate success of the Initiative Petition, Appellants Shull and Stockman's strong personal interest in this case is properly characterized as distinct and unique.

This Court recently held that taxpayer advocates can possess unique interests sufficient to warrant permissive intervention in cases where they seek to defend the very same proposal or initiative already defended by the State. In *Johnson,* a group of citizens, residents, taxpayers and registered voters of Missouri, who were also members of the Missouri House of Representatives, moved to intervene in an action challenging a redistricting plan approved by the Missouri Secretary of State. Even though the intervenors sought to defend the very same redistricting plan already being defended by the Secretary of State, this Court recognized that permissive intervention was proper

because the intervenors had "unique interests at stake . . . that went beyond their interests as taxpayers." *Johnson* at 12. In particular, the intervenors had "personal and economic interests related to their planned reelection efforts, including interests in preventing delay and uncertainty and in avoiding unnecessary expenditures of time and resources." *Id.* at 12.

Here, like the intervenors in *Johnson,* Shull and Stockman possess unique personal interests that go beyond their interests as mere taxpayers. Appellants are personally committed to the success of this particular Initiative Petition, as demonstrated by their role as supporters, signers, advocates, donors and volunteers for the Initiative Petition, and have an interest in "preventing delay and uncertainty," *id.,* that could interfere with the ultimate success of the Initiative Petition. Just as the intervenors in *Johnson* sought to intervene to protect their "interests in running for re-election" and to avoid "the delay, uncertainty, and expenditures of time and resources that they will suffer" if the redistricting plan was invalidated, *id.* at 11, the Appellants here also requested intervention to avoid the delay, uncertainty, and wasteful expenditure of time, money and effort that would occur if the Plaintiffs succeeded in invalidating the Initiative Petition.

The trial court exhibited an arbitrary indifference to the unique, personal interests of Shull and Stockman. Even though Shull and Stockman presented the trial court with affidavits setting forth their activities in support of the Initiative Petition and their personal interest in the ultimate success of the Initiative Petition, the trial court chose to disregard the clear distinction between Appellants' interests and the State Defendants' interests, and denied intervention simply because "Intervenors seek to defend the ballot

title and fiscal note for the subject Initiative in the exact form they were issued and approved by Secretary of State and State Auditor . . . ." (Reuter L.F. 83-84; Prentzler L.F. 119-120; Northcott L.F. 166-167; Francis L.F. 121-122.) Further, although the trial court was aware that the State Auditor had failed to serve any discovery, expressed a clear intention to not engage in any discovery and would proceed to trial with no experts or other witnesses to counter the evidence presented by four sets of plaintiffs' attorneys, the trial court still refused to recognize Appellants' unique, personal interest in the Initiative Petition – an interest that clearly transcended the State Defendants' minimal interest in cobbling together an obligatory defense that consisted of no witnesses, no evidence, only minimal cross examination, and the Auditor's failure to file a post-trial brief even though the trial judge indicated that he would find one to be helpful.

The trial court's refusal to recognize this stark distinction between the interests of Shull and Stockman and the interests of the State resulted in a ruling "clearly against the logic of the circumstances then before the court . . . ." *Am. Tobacco Co.,* 34 S.W.3d at 131.

The arbitrariness of the trial court's decision is perhaps best illustrated by the outrageous claims made by Plaintiffs at trial that went completely unchallenged by the State Defendants. In *Brewer v. Missouri*, SC90647, 2012 WL 716878, at *2 (Mo. Mar. 6, 2012), the record showed that a payday loan customer who borrowed $2,200 and made two payments of $1,100 over the next two months, was only able to reduce her principal by $.06. Basic logic suggests that this customer might be required to pay tens of thousands of dollars to retire her $2,200 debt. In the current case, the Plaintiffs were able

to turn logic on its head and convince the trial court that if the interest rate on this type of loan was capped at 36%, Ms. Brewer and others like her would have less money to spend, and the Missouri economy would suffer. (Northcott Tr. 3/27/12 9-11.) Because Appellants were forbidden from participating in the trial and presenting a defense to this attack on the Initiative Petition, Plaintiffs' absurd claims went unchallenged and prevailed upon the trial court. (Prentzler L.F. 262, Northcott L.F. 293; Francis L.F. 205; Reuter L.F. 162.)

Had Shull and Stockman been allowed to timely intervene, they would have required all Plaintiffs to disclose their expert witnesses, taken depositions of those experts, and prepared to cross examine those experts and present rebuttal evidence at trial. The lack of adequate trial preparation by the State Defendants was particularly appalling in this case. Trial counsel for the Auditor was literally reading Dr. Durkin's expert report for the first time as Dr. Durkin testified on the stand. When time for cross examination arrived, the Auditor's counsel was obviously shooting in the dark and fumbling, which was not surprising since counsel was not able to even thoroughly read Dr. Durkin's report during direct examination and had no idea what Dr. Durkin might say in response to questioning. The State Defendants' failure to present any defense to this attack on the Initiative Petition demonstrates that Appellants could have and would have presented a distinct defense, and should have been granted permissive intervention for that reason.

The trial record reveals several other glaring deficiencies. Absent from the testimony was any consideration of whether other states that have capped payday loan

rates have experienced the dire consequences predicted by the industry's retained experts. (*See generally* Northcott Tr. 3/27/12.) Similarly, the State Defendants failed to present any evidence regarding what would happen to the economy if individuals like Ms. Brewer could be protected from paying thousands of dollars in interest to a company that ships much of its profit out-of-state. (*Id.*) State Defendants could have initiated an inquiry into the fiscal impact of Ms. Brewer retaining her money and investing it in Missouri by, for instance, making a down payment on a home in Missouri. However, because the circuit court denied Appellants' intervention, the court heard only a one-sided, self-serving attack on the Initiative Petition.

Further, the trial court's decision sets a dangerous precedent that jeopardizes the integrity of Missouri's ballot initiative process. Courts have noted that ballot initiatives are tools of "participatory democracy" and their purpose is to allow the electorate to resolve questions where their duly elected representatives fail to act or refuse to implement a change the public seeks. *State ex rel. Blackwell v. Travers,* 600 S.W.2d 110, 113 (Mo. App. E.D. 1980) (addressing a comparable initiative right vested in a city charter in Missouri). Missouri courts have suggested that this right must be vigorously protected; holding that assertion of the constitutional right to exercise power of initiative should not be lightly cast aside. *United Labor Comm. of Missouri v. Kirkpatrick*, 572 S.W.2d 449, 454 (Mo. 1978) (addressing the constitutional right to initiative petition). *See also Missourians to Protect the Initiative Process,* 799 S.W.2d at 827 ("When courts are called upon to intervene in the initiative process, they must act with restraint,

trepidation and a healthy suspicion of the partisan who would use the judiciary to prevent the initiative process from taking its course.")

This case aptly illustrates why there is a tremendous need for participatory democracy, and a solemn duty to defend the ballot title and fiscal summary produced by the State. Here, the payday loan industry used its vast wealth and resources to finance four frivolous challenges to the Initiative Petition with only one intended outcome: to subvert the will of the People of Missouri and prevent the Initiative Petition from proceeding to the November ballot. The Plaintiffs knew that the State Defendants did not possess comparable financial resources to defend the Initiative Petition, and that they could marshal their wealth to manipulate the judiciary to prevent the initiative petition from succeeding. Such a brazen manipulation of wealth to undermine the integrity of this State's ballot initiative process must be regarded with a "healthy suspicion," and must not be permitted to become yet another tool of wealthy special interest groups to preserve their interests at the expense of the Missouri Constitution.

ii. Appellants Shull and Stockman had no alternative means to defend the Initiative Petition other than through permissive intervention.

The trial court also failed to recognize that intervention was the only way for Appellants Shull and Stockman to defend the Initiative Petition. Although Shull and Stockman are part of a broader campaign that launched the Initiative Petition, Missouri law dictates that Plaintiffs' challenge to the Initiative Petition must be directed against the Secretary of State and State Auditor. Consequently, intervention is the only way for proponents of the Initiative Petition to defend their interests. The trial court's denial of

intervention completely fails to account for the fact that Shull and Stockman possess no alternative means to defend their interest in seeing the Initiative Petition placed on the November 2012 ballot. Failure to account for this critical fact may only be characterized as "arbitrary and unreasonable." *Id.*

The trial court's denial of permissive intervention severely prejudiced Appellants' interest in defending the Initiative Petition, and resulted in a shocking injustice: the entry of a judgment finding the summary statement, fiscal note, and fiscal note summary insufficient and unfair, which opponents have trumpeted to the press as being a judgment that will invalidate thousands of signatures and the dissolution of any chance of having the Initiative Petition appear on the November 2012 ballot. The trial court failed entirely to consider the unique interests of Appellants and Appellants' inability to defend the Initiative Petition through any alternative means, and thereby allowed the payday loan industry to continue its legacy of using its wealth to shield it from accountability. Such an arbitrary and unjust decision amounts to a clear abuse of discretion that should be overturned by this Court.

CONCLUSION

For the foregoing reasons, this Court should reverse the circuit court's final judgments denying permissive intervention to Appellants Shull and Stockman, remand the cases for further proceedings that protect Appellants' interests from prejudice, and issue such other and further relief as justice may require.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND OF COMPLIANCE WITH RULE 84.06

I hereby certify that on the 1st day of June, 2012, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system on all counsel of record:

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I also hereby certify that the foregoing Brief complies with the limitations contained in Rule 84.06(b) and that it contains 8,702 words.

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